

FILED
SUPREME COURT
STATE OF WASHINGTON
1/26/2023 1:45 PM
BY ERIN L. LENNON
CLERK

SUPREME COURT NO. 101467-8
COA: 56333-9-II

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

DIRECT APPEAL OF
GABRIEL JOSEPH MORALES
FROM PIERCE COUNTY SUPERIOR COURT
CAUSE NO. 15-1-04976-5

MOTION FOR DISCRETIONARY REVIEW

[Treated as a Petition for Review](#)

GABRIEL JOSEPH MORALES
PETITIONER, PRO SE

GABRIEL JOSEPH MORALES DOC# 361846
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WASHINGTON 98520

MOTION: DISCRETIONARY REVIEW

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APPENDIX A. - "Unpublished opinion of the court of Appeals Division II
No. 5633-9-II of STATE V MORALES JOSEPH MORALES from OCTOBER 25th
2022. Pgs. 1-4 -- 1, 2, 3, 5

APPENDIX B. - Appellant copy of MOTION REQUESTING TRANSCRIPTS AND
DOCUMENTS FROM SUPERIOR COURT FILE filed April 5, 2022 by GABRIEL
JOSEPH MORALES to COA DIVISION II. pg 1-2 -- 1, 3

APPENDIX C - A Ruling by Commissioner BEARSE filed on April 6th, 2022
sent to all parties by court clerk DEREK M. BYRNE. pg 1 -- 2, 3

APPENDIX D. Email from Stephanie Cunningham customer ID 27286842 to
GABRIEL MORALES, ID 361846 on 11-14-2022 at 03:53 PM (EST). Email is
through JPay. Pg 1 -- 2, 1

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TABLE OF AUTHORITIES
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- STATE V. BLAKE - 3
- STATE V. DRUM, 168 Wn.2d 23, 38, n.3, 225 P.3d 237 (2010) - 4
- STATE V. QUISMUNDO, 164 Wn.2d 499 504 192 P.3d 342 (2008) - 5

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CrR 7.2(b) - 2

STATUTES

RCW 94.72.085 -- 6

RAP RULES

RAP 13.5 - 1
RAP 16.4 - 1
RAP 10.10 - 2
RAP 9.6(a) - 3
RAP 1.2 - 3
RAP 9.1(c) - 4
RAP 9.2(b) - 4

A. IDENTITY OF PETITIONER:

Petitioner, GABRIEL JOSEPH MORALES, Asks this court to accept review of the court of appeals decision designated in Part B of this motion.

B. COURT OF APPEALS DECISION:

Pursuant to RAP 13.5 and 16.4, GABRIEL JOSEPH MORALES MOVES for discretionary review of the Court of Appeals (COA) division two unpublished decision entered on October 25th 2022, in the direct appeal of Appellant GABRIEL JOSEPH MORALES From Pierce county Superior COA NO. 56333-9-II, order deny appeal in Part. A copy of the court of Appeals decision is in the Appendix A.

C. ISSUES PRESENTED FOR REVIEW:

1. Should have the Court of Appeals (COA) made a meaningful ruling on the merits regarding Mr. Morales due process claim?
2. Did the COA fail to consider the entire report of proceeding regarding Mr. Morales's criminal history?

D. STATEMENT OF CASE:

On 9-17-2021 Mr. Morales was resentenced in the Pierce county Superior court under cause NO. 15-1-04976-5. Mr. Morales appealed to the Court of Appeals (COA) Division Two.

On or about 4-5-2022 Mr. Morales motion the Court of Appeals and requested court papers (CP) and court transcripts (VRP) and or Documents (See APPENDIX B.) Mr. Morales requested these a week after his appellate counsel, Stephanie Cunningham filed her opening brief on 3-28-2022. Mr. Morales requested these documents from the COA to file

his Statement of Additional Grounds (SAG) RAP 10.10.

On 4-6-2022 court clerk Derek M. Bryne responded to Mr. Morales's MOTION REQUESTING TRANSCRIPTS AND DOCUMENTS FROM SUPERIOR COURT FILE where he states Mr. Morales states "he has not received the CP and VRP for his appeal. Also that Mr. Morales's counsel mailed the documents to Mr. Morales on 4-1-2022. (see APPENDIX C).

Mr. Morales filed his SAG, RAP 10.10 on or about 6-2-2022. Mr. Morales attached the documents that he requested from the COA on 4-5-2022 to his SAG and properly referenced documents in the proper APPENDIX that was attached to the SAG.

On 10-25-2022 the COA filed an unpublished opinion (see APPENDIX A). In this opinion the COA refers to Mr. Morales's SAG and states the motions (documents) "Morales references are not part of our record. While he attaches certain filings to the APPENDIX of his SAG, these documents are not included in our record."

On 11-14-2022, attorney Stephanie Cunningham apologizes and explains why the documents that the COA say are not part of the record, were not part of record or designated. (See APPENDIX D).

E. ARGUMENT OF WHY REVIEW SHOULD BE GRANTED:

1. YES, the court of Appeals (COA) should have made a meaningful ruling on the merits regarding Mr. Morales's due process claim.

Pursuant to Superior court criminal rule CrR 7.2(b) "the court shall ... advise the defendant ... (5) of the right, if unable to pay the cost there of, to have counsel appointed and portions of the trial

record necessary for review of assigned errors transcribed at public expense for an appeal ... These proceedings shall be made a part of the record." Id.

Here, the issue of whether the court of appeals should have provided Mr. Morales a meaningful decision on the merits of his claim that the trial court denied him due process during the resentencing hearing pursuant to STATE V. BLAKE, a Supreme court holding in and of itself that created this unique circumstances, justice would have been better served by acting on the commissioner's Bearee ruling on April 6th 2022 (See APPENDIX C) granting Mr. Morales's motion filed on April 5th, 2022 (See APPENDIX B) for "the CP and VRP for his appeal. (See APPENDIX C).

However unartful the motion was titled," any party may supplement the designation of clerk's papers and exhibits prior to or with the filing of the party's last brief." Rules of Appellate Procedure (RAP) 9.6

(a) and this is exactly what Mr. Morales did when he filed his Pro Se motion with the court of Appeals on April 5, 2022 (See APPENDIX B).

Mr. Morales agrees with the COA that "the right to be meaningful heard" (STATE V. MORALES, COA NO. 56333-9-11, at 3 See APPENDIX A) is certainly at the core of procedural due process and so, an "interpretation and waiver or rules by the court" would have been appropriate in this case. RAP 1.2.

As to review taken by the court's discretion, Mr. Morales posits that the action of this court should be remand this case to the Court

of Appeals for reconsideration in light of STATE V. DRUM, 168 Wn.2d 23, 38 n.3, 225 P.3d 237 (2010).

Notwithstanding the fact that Mr. Morales was an indigent defendant and appointed counsel by the trial court to represent him on appeal, not only did he notify counsel of the errors to be raised on direct review. (see original Notice of Appeal, filed by Mr. Morales) (also sent Statement of Additional Grounds (SAG) to counsel before heard by COA) he went further and carried his responsibility and moved the Court of Appeals to supplement the designation of the clerk's papers.

Before this court, there is no dispute that Mr. Morales's resentencing motions were properly raised at the trial court level. Under RAP 9.1(c), "clerk's papers include the pleading, orders and other papers and other papers filed with the clerk of the trial court" and RAP 9.2(b) states that "a party should arrange for the transcription of all portions of the VRP necessary to present the issues raised on review. Id.

As such, the ruling granting Mr. Morales's motion on April 6th 2022 referenced above should lead this court to take some action as the situation requires.

2. YES, the court of appeals did fail to consider the entire report of proceeding regarding Mr. Morales's criminal history.

In its opinion the COA states "the court specifically noted on the record that the parties stipulated to Morales's criminal history, and

the court noted that the stipulation was signed by Mr. Morales. "(See APPENDIX A). While the court did state this, this is not the full accurate record.

As stated by Mr. Morales in his SAG pg.2 and 3 the prosecutor corrects the sentencing Judge on his misleading statement about Mr. Morales signing a stipulation to his criminal history. Specifically Prosecutor Neeb states "Judge if I could address one other thing about that, that is Mr. Morales signed the stipulation on criminal history stating that it was accurate and complete. That's not true." (See sentencing hearing 9-17-21 Pg. 24 Mr. Morales's SAG pg. 2-3).

This statement again was after the Judges statement that the court of appeals references on pg. 3 of its opinion (See APPENDIX A). Furthermore, the court does not tell Prosecutor Neeb that he is wrong or inaccurate about what he is saying so this court and the Court of Appeals should by the complete record hold that Mr. Morales did not sign an stipulation on his criminal history.

This court should remand back to the Court of Appeals so it can make a ruling on the complete and correct record.

A court abuses its discretion by using the wrong legal standard or by resting its decision upon facts unsupported by the record, STATE V. QUISMUNDO, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

F: CONCLUSION:

For the above reasons this court should grant review and remand back to the Court of Appeals so that court can reconsider with

complete and accurate record. A reference hearing is also requested. A lawyer is also requested.

I GABRIEL JOSEPH MORALES, am over the age of majority and also a U.S. citizen competent to testify and here in attest under penalty of perjury that all statements contained here in is the absolute truth to the best of my knowledge. RCW 9A.72.085.

Respectfully signed and submitted this 26 day of January,
2023

Gabriel Morales
GABRIEL JOSEPH MORALES DOC #361846
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, Washington 98520

APPENDIX

A

RAP 9.2

Filed
Washington State
Court of Appeals
Division Two

October 25, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

GABRIEL JOSEPH MORALES,

Appellant.

No. 56333-9-II

UNPUBLISHED OPINION

VELJACIC, J. — Gabriel J. Morales appeals the imposition of a \$200 criminal filing fee after he was resentenced in 2021. The State concedes that the filing fee should be stricken. In his statement of additional grounds (SAG) for review, Morales contends that his due process rights were violated and he received ineffective assistance of counsel during the resentencing hearing. We agree with the State regarding the criminal filing fee and remand for the trial court to strike that fee. We affirm all other aspects of Morales’s sentence.

FACTS

In 2017, a jury found Morales guilty of unlawful possession of a controlled substance with intent to deliver, unlawful possession of a controlled substance, unlawful possession of a firearm in the first degree, and possession of a stolen firearm. At sentencing, the trial court imposed a \$200 criminal filing fee as a legal financial obligation (LFO). We affirmed Morales’s convictions in an unpublished opinion, but remanded to the trial court to strike the imposed criminal filing fee because the trial court found Morales indigent. *State v. Morales*, No. 50782-0-II, slip. op. at 16 (Wash. Ct. App. May 29, 2019) (unpublished),

<http://www.courts.wa.gov/opinions/pdf/D2%2050782-0-II%20Opinion.pdf>. But after the mandate issued, no action was taken in the trial court.

In 2021, pursuant to *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521(2021),¹ the trial court vacated Morales's unlawful possession of a controlled substance conviction and resentenced him after holding a resentencing hearing. Regarding LFOs, the court stated that it was only imposing the "mandatory minimums." Report of Proceedings (RP) (Sept. 17, 2021) at 42. But in its order correcting judgment and sentence, the court stated that the \$200 criminal filing fee "remains imposed." Clerk's Papers at 125. Morales appeals his corrected judgment and sentence.

ANALYSIS

I. CRIMINAL FILING FEE

Morales contends that the trial court wrongly imposed the criminal filing fee as an LFO on his corrected judgment and sentence. The State agrees. We accept the State's concession.

The trial court found Morales to be indigent. *Morales*, slip. op. at 16. Trial courts are prohibited from imposing criminal filing fees on criminal defendants found to be indigent. RCW 36.18.020(2)(h); *State v. Ramirez*, 191 Wn.2d 732, 746, 426 P.3d 714 (2018). We previously directed that the criminal filing fee be stricken. *Morales*, slip. op. at 16. We again direct the trial court to strike the criminal filing fee from Morales's judgment and sentence.

II. SAG ISSUES

A. Due Process

Morales argues that he was denied due process during the resentencing proceedings because the trial court did not rule on his pro se motions filed prior to resentencing, the court did

¹ The court in *Blake* held that Washington's strict liability drug possession statute, former RCW 69.50.4013(1) (2017), "violates the due process clauses of the state and federal constitutions and is void." 197 Wn.2d at 195.

not require him to sign a stipulation on criminal history, and the court did not conduct a full resentencing hearing. We disagree.

Procedural due process at its core is the right to be meaningfully heard. *State v. Lyons*, 199 Wn. App. 235, 240, 399 P.3d 557 (2017). We first note that the motions Morales references are not a part of our record. While he attaches certain filings to the appendix of his SAG, these documents are not included in our record. We do not review documents attached to a brief that are not included in our record. RAP 10.3(a)(8). Regarding his other arguments, our record shows that the trial court held a resentencing hearing, the court specifically noted on the record that the parties stipulated to Morales's criminal history, and the court noted that the stipulation was "signed by Mr. Morales." RP (Sept. 17, 2021) at 23. Accordingly, Morales fails to show a due process violation.

B. Ineffective Assistance of Counsel

Morales next argues that he was denied effective assistance of counsel because counsel encouraged the trial court to not rule on his pro se motions and that counsel further contributed to Morales's due process rights being violated. We disagree.

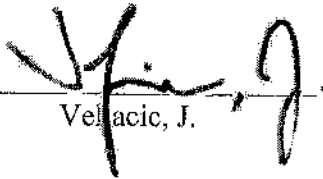
To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's performance was deficient and counsel's deficient performance prejudiced the defense. *State v. Elwell*, 199 Wn.2d 256, 277, 505 P.3d 101 (2022). If the defendant fails to satisfy either prong, then the defendant's ineffective assistance of counsel claim fails. *Id.*

Our record does not show that counsel's performance was professionally unreasonable. Even assuming counsel's performance was deficient, Morales fails to show prejudice. For these reasons, we reject Morales's ineffective assistance of counsel claim.

CONCLUSION

We affirm Morales's resentencing following *Blake* except for the imposition of the criminal filing fee. We remand to the trial court to strike the criminal filing fee.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.




Velacic, J.

We concur:



Cruser, A.C.J.



Price, J.

B

APPENDIX

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
RESPONDENT,

V

GABRIEL JOSEPH MORALES,
APPELLANT.

NO: 56333-9-II

REQUESTING TRANSCRIPTS
AND DOCUMENTS FROM
SUPERIOR COURT FILE

COMES NOW the Appellant GABRIEL JOSEPH MORALES, MOVES this court for the transcripts and everything that was filed to the Superior court which is not limited to the motions filed by the Appellant for the above cause number which is also cause No: 15-1-04976-5 for Pierce county Superior court.

The Appellant requests all transcripts. Also all documents filed to the Superior court. Furthermore all motions filed by the Appellant which is not limited to, *All FROM 2021.*

1. MOTION TO MODIFY OR CORRECT JUDGMENT AND SENTENCE (CrR 7.8)
2. MOTION TO AMEND CrR 7.8 IN REGARDS TO STATE.V. BLAKE.

3. MOTION FOR ARREST OF JUDGMENT (pursuant to CrR 7.4)
4. REQUEST FOR EXCEPTIONAL SENTENCE DOWNWARD AND MEMORANDUM.
5. MOTION: OBJECTION TO OFFENDER SCORE PURSUANT TO RCW 9.94A.530(2)

Additionally the Appellant request the full transcript which is not limited to the two court dates held.

1. In front of Judge Phillip K. Sorenson on or about the month of June, 2021.
2. In front of Judge Edmund Murphy on or about the month of September, 2021.

Respectfully signed and submitted this 5th day of April, 2022

Gabriel Morales
GABRIEL JOSEPH MORALES DOC #361846
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, Washington 98520

APPENDIX

C



Washington State Court of Appeals

Division Two

909 A Street, Suite 200, Tacoma, Washington 98402

Derek Byrne, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> **OFFICE HOURS:** 9-12, 1-4.

April 6, 2022

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Tacoma, WA 98402-2171

**CASE #: 56333-9-II/State of Washington, Respondent v. Gabriel Joseph Morales,
Appellant**

Counsel:

On the above date, this court entered the following notation ruling:

A RULING BY COMMISSIONER BEARSE:

Gabriel Morales moves for a 45-day extension of time to file a Statement of Additional Grounds. He states he has not received the CP and VRP for his appeal. The motion is granted. Morales is notified that his counsel mailed these documents to him on April 1, 2022, so no additional extensions will be granted.

Very truly yours,

Derek M. Byrne
Court Clerk

APPENDIX

D

You have received a *jp*ay letter, the fastest way to get mail

From : Stephanie Cunningham, CustomerID: 27286842
To : GABRIEL MORALES, ID: 361846
Date : 11/14/2022 3:53:46 PM EST, Letter ID: 1632972372 Parent Letter ID: 1632905371
Location : S01
Housing : H3 H3092UA

The pro se motions are in the Superior Court record, so I have access to them to provide them to you, but I did not designate them to be sent to the Court of Appeals to be made a part of the appellate court record. I designate the documents that are relevant and necessary to the issues I raise in the Opening Brief. At trial or sentencing, if a defendant is represented by an attorney, the defendant is not allowed to file pro se motions and the trial judge will not rule on them. So I did not originally designate these motions to be sent to the Court of Appeals because they were not going to be relevant to issues I would raise.

I am sorry that I did not realize before that these documents were not in the appellate record. However, it is generally not my responsibility to keep track of and designate the documents a client may need for a SAG, since the SAG is a pro se document and not within the scope of my appointment. But if you feel it was ineffective for me not to designate them for you, then you can obviously raise that issue in a petition for review to the State Supreme Court or file a PRP in the Court of Appeals.

***jp*ay Tell your friends and family to visit www.jp.com to write letters and send money!**

INMATE

January 26, 2023 - 1:45 PM

Transmittal Information

Filed with Court: Supreme Court

Appellate Court Case Number: 101467

DOC filing of MORALES Inmate DOC Number 361846

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- 101467_20230126014504SC180153_6988_InmateFiling.pdf {ts '2023-01-26 13:37:40'}

The Original File Name was doc1pabr1108_20230126_134034.pdf

The DOC Facility Name is Stafford Creek Corrections Center.

The Inmate The Inmate/Filer's Last Name is MORALES.

The Inmate DOC Number is 361846.

The CaseNumber is 101467.

The Comment is 1OF1.

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